

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 20116978
 J. ACOSTA AND)
 M. CASTRO)
 _____)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: J. Acosta and M. Castro

For Respondent: Eric R. Brown, Tax Counsel III

K. GAST, Administrative Law Judge: On March 30, 2022, Office of Tax Appeals (OTA) issued an Opinion sustaining respondent Franchise Tax Board's (FTB) proposed assessments of additional tax, plus applicable interest, for the 2016, 2017, and 2018 tax years. In the Opinion, OTA held it does not have jurisdiction to decide whether 49 U.S.C. section 11502(a), a federal statute, preempts or otherwise prohibits California from taxing resident appellant-wife's community property share of nonresident appellant-husband's out-of-state railroad wages. Appellants timely filed a petition for rehearing (petition) under Revenue and Taxation Code (R&TC) section 19048. Upon consideration of appellants' petition, OTA concludes they have not established a basis for a rehearing.

A rehearing may be granted where one of the following six grounds exists, and the substantial rights of the complaining party (here, appellants) are materially affected: (1) an irregularity in the appeal proceedings which occurred prior to issuance of the Opinion and prevented fair consideration of the appeal; (2) an accident or surprise which occurred during the appeal proceedings and prior to the issuance of the Opinion, which ordinary caution could not have prevented; (3) newly discovered, relevant evidence, which the party could not have reasonably discovered and provided prior to issuance of the Opinion; (4) insufficient evidence to justify the Opinion; (5) the Opinion is contrary to law; or (6) an error in law in the appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6).)

In their petition, appellants largely contend the Opinion is contrary to law. “[T]he ‘contrary to law’ standard of review shall involve a review of the Opinion for consistency with the law.” (Cal. Code Regs., tit. 18, § 30604(b).) To find that the Opinion is contrary to law, OTA must determine whether the Opinion is unsupported by any substantial evidence. (*Appeals of Swat-Fame, Inc., et al.*, 2020-OTA-045P.) This requires a review of the Opinion to indulge in all legitimate and reasonable inferences to uphold it. (*Ibid.*) The relevant question is not over the quality or nature of the reasoning behind the Opinion, but whether the Opinion can or cannot be valid according to the law. (*Ibid.*) In its review, OTA considers the evidence in the light most favorable to the prevailing party (here, FTB). (*Ibid.*)

Appellants essentially renew their arguments from their underlying appeal. For example, they assert 49 U.S.C. section 11502(a) “bars FTB from subjecting the protected railroad compensation to any aspect of California Personal Income Tax Law,” and “[R&TC] [s]ection 17951(b)(2) expressly recognizes this compensation is not subject to California’s Personal Income Tax Law.”

However, OTA carefully and thoroughly considered appellants’ contentions in rendering its detailed Opinion. OTA concluded Article III, section 3.5, of the California Constitution prohibits it from ruling on whether 49 U.S.C. section 11502(a) preempts R&TC section 17041(a) or state community property laws because appellants did not direct OTA to, nor was OTA aware of, any appellate court that has made that determination. OTA also concluded R&TC section 17951(b)(2) does not change this result because it only applies to nonresidents. Therefore, R&TC section 17951(b)(2) does not prohibit California from attributing one-half of nonresident appellant-husband’s out-of-state railroad wages to resident appellant-wife as her community property interest and taxing her in full on such income. Indeed, in their petition, appellants have not pointed to any legal authority that shows the Opinion cannot be valid according to the law.¹

In short, appellants’ dissatisfaction with the Opinion and attempt to reargue the same issue does not constitute grounds for a rehearing. (*Appeal of Graham and Smith*, 2018-OTA-

¹ In their petition, appellants also appear to assert there was an irregularity in the appeal proceedings that occurred prior to issuance of the Opinion and prevented fair consideration of the appeal. They allege “the panel failed to ask a single substantive question [of] appellants during oral argument” and “the panel evidenced an apparent lack of interest” in their arguments. OTA finds this contention to be without merit because, again, it carefully and thoroughly reviewed all the briefing, evidence, and oral arguments in this appeal in rendering its detailed Opinion.

154P.) As noted in the Opinion, the rightful process for appellants to seek such a remedy is to pay the proposed assessments, request refunds, and pursue their constitutional arguments in the courts. (See *Hyatt v. Yee* (9th Cir. 2017) 871 F.3d 1067, 1074-1075.) Consequently, OTA denies appellants’ petition.

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Kenneth Gast
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Kenneth Gast
Administrative Law Judge

We concur:

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Keith T. Long
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Keith T. Long
Administrative Law Judge

DocuSigned by:
John O Johnson
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John O. Johnson
Administrative Law Judge

Date Issued: 6/14/2022